

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

In the Matter of)	
)	
Amendment of Section 73.202(b))	MB Docket No. 06-77
Table of Allotments)	RM-11324
FM Broadcast Stations)	RM-11334
(Edinburgh, Hope, Versailles, and)	
Tell City, Indiana, Burkesville, Greensburg,)	
Hodgenville, Horse Cave, Lebanon,)	
Lebanon Junction, Lewisport, Louisville,)	
Lyndon, New Haven, Springfield,)	
and St. Matthews, Kentucky,)	
and Belle Meade, Goodlettsville,)	
Hendersonville, Manchester,)	
and Millersville, Tennessee))	

FILED/ACCEPTED

DEC 29 2006

Federal Communications Commission
Office of the Secretary

To: Office of the Secretary
Attn: Assistant Chief, Audio Division
Media Bureau

OPPOSITION TO PETITION FOR RECONSIDERATION

Newberry Broadcasting, Inc., Elizabethtown CBC, Inc., and Cumulus Licensing LLC (the "Joint Parties"), by their respective counsel, hereby oppose the Petition for Reconsideration filed by Indiana Community Radio Corporation ("ICRC") in the above captioned proceeding.¹ ICRC attempts to revive its defective proposal to allot Channel 262A at Morristown, Indiana for use by non-commercial educational Station WJCF(FM). However, the Media Bureau dismissed

¹ The FCC released ICRC's Petition for Reconsideration in the Federal Register on December 20, 2006. The deadline for filing oppositions is January 4, 2007. See Report No. 2798. Thus, this Opposition is timely. Indiana University also filed a Petition for Reconsideration and the Joint Parties are contemporaneously filing a separate Opposition to that petition. Also, the FCC's Electronic Comment Filing System (ECFS) indicates that a number of letters have been filed in support of Indiana University's Petition. None of these letters were served on the Joint Parties and some of these letters lack a return address. Nevertheless, the Joint Parties are serving a copy of this Opposition on the individuals who provided a return address.

this proposal because, *inter alia*, it “does not conflict with any proposal in this proceeding.”² ICRC also raises for the first time a number of unrelated arguments, all of which are unsupported by any factual or technical showing. In addition, these arguments are frivolous and have no legal basis. Therefore, the FCC must dismiss ICRC’s Petition expeditiously so that the public can realize the benefits of the Joint Parties’ proposal. In support hereof, the Joint Parties state as follows:

1. The *NPRM* in this proceeding was released in response to a proposal filed by the Joint Parties on March 21, 2005.³ On May 30, 2006, CXR Holdings, LLC (“CXR”) filed a Counterproposal in response to the *NPRM*. Both the Joint Parties’ proposal and CXR’s Counterproposal proposed a number of changes to the FM Table of Allotments that will serve the public interest. While both of these proposals were originally in conflict, the parties were able to propose a plan to eliminate the conflict, and on October 13, 2006, the FCC granted both the Joint Parties’ proposal (as amended) and CXR’s Counterproposal.

2. At the outset, the Joint Parties note that ICRC’s proposal does not conflict with the Joint Parties’ proposal. Thus, even if the FCC grants the relief requested by ICRC, it will have no impact on the Joint Parties proposal. Thus, the Joint Parties are contemporaneously filing a Request to Sever their proposal from this proceeding so that it can be granted by final order and the public interest benefits can be realized in a timely manner.

3. It appears that the main thrust of ICRC’s Petition relates to a proposal it originally filed in MB Docket No. 05-17,⁴ and attempted to refile in this proceeding. More specifically,

² See *Burkesville, Kentucky, et al.*, Report and Order, 21 FCC Rcd 11465, ¶13 (MB 2006) (“*R&O*”).

³ See *Hodgenville, Kentucky, et al.*, Notice of Proposed Rule Making, 21 FCC Rcd 3560 (2006) (“*NPRM*”).

⁴ ICRC filed a number of proposals in MB Docket No. 05-17. The first was filed before the Report and Order was issued in that docket and was addressed by the FCC in the Report and Order. See *Connersville, Indiana, et al.*,

ICRC is attempting to allot Channel 262A at Morristown, Indiana for use by non-commercial educational Station WJCF(FM) in violation of the FCC's procedural and technical rules. ICRC believes that its proposal should have been acted on by the FCC before resolution of this proceeding because ICRC's proposal was filed first. However, ICRC fails to acknowledge that its first proposal was indeed acted on by the FCC in MB Docket No. 05-17. In fact, the FCC dismissed ICRC's proposal in that docket due to numerous technical and legal defects.⁵ If ICRC was dissatisfied with the Commission's decision to dismiss its proposal, the proper forum to protest that decision would have been in MB Docket No. 05-17.⁶

4. ICRC attempted to cure all of these defects with its proposal in MB Docket No. 05-17 by filing it in this proceeding. However, it still contained numerous procedural and technical defects and was properly dismissed by the Bureau. More specifically, it was untimely, in violation of the current freeze on rule making petitions,⁷ and not shown to be in conflict with any proposal in this proceeding. Thus, the Bureau had no choice but to strike the ICRC proposal and comments for these reasons. The *Notice of Proposed Rule Making* expressly stated that "[c]ounterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be

Report and Order, 20 FCC Rcd 18871, ¶¶ 13-14, 26 (2005). ICRC's other proposals were filed in December 2005 and January 2006 after the Report and Order that dismissed ICRC's first proposal was issued.

⁵ *Id.* at ¶¶ 13-14, 26. ICRC's proposals were actually contingent on the outcome of MB Docket No. 05-17, which by itself makes them defective. See *Okmulgee, Oklahoma et al.*, 10 FCC Rcd 12014 (MMB 1995) (Contingent proposals are unacceptable for filing, and must be dismissed). Furthermore, it is the policy of the Commission not to accept any rule making proposal that is contingent on the outcome of another rule making proceeding. *Saint Joseph, Clayton, Ruston, and Wisner, Louisiana*, 18 FCC Rcd 22 (MB 2004). These are additional reasons why ICRC's proposals were dismissed by the Commission in MB Docket No. 05-17.

⁶ MB Docket No. 05-17 is final because the time period for reconsideration or Commission review has expired. See 47 C.F.R. §§ 1.115, 1.117, 1.429.

⁷ See *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services, Notice of Proposed Rule Making*, 20 FCC Rcd 11169, ¶ 47 (2005).

considered if advanced in reply comments.”⁸ The comment date in this proceeding was May 30, 2006. ICRC filed its proposal on August 7, 2006; over two months late. Further, even if it were a timely counterproposal, there is no evidence that it conflicts with any of the proposals in this proceeding. “A counterproposal is a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made.”⁹ The channel study that ICRC provides fails to show a conflict with any proposal in this proceeding. Thus, for this reason, the Bureau dismissed ICRC’s proposal.

5. ICRC also raises a number of unrelated arguments, all of which are false and unsupported by any factual or technical showing. First, ICRC claims that Cumulus is in violation of the FCC’s multiple ownership rules in Nashville.¹⁰ In addition to the fact that this argument is false and unsupported by any evidence, it is also irrelevant to the outcome of this proceeding. It is established policy that the FCC does not consider ownership issues in conjunction with an allotment rulemaking proceeding.¹¹ Rather, any issue with respect to compliance with Section 73.3555 of the Rules will be considered in conjunction with the applications to implement the reallocation.¹² Second, ICRC raises an issue with the renewal of Station WRKA(FM), which was granted over two years ago (on September 7, 2004).¹³ In addition to being untimely, false, and unsupported by any evidence, this argument again is raised in the wrong proceeding. If ICRC believed that there was an issue with Station WRKA(FM)’s

⁸ See *NPRM*, 21 FCC Rcd at Appendix.

⁹ *Milton, West Virginia and Flemingsburg, Kentucky*, 11 FCC Rcd 6374 (MMB 1996).

¹⁰ See ICRC Petition at p. 1.

¹¹ See *Chillicothe and Asheville, Ohio*, 17 FCC Rcd 22410 (MB 2002), *recon. denied*, 18 FCC Rcd 22410 (MB 2003), *Application for Review pending*. See also, *Detroit Lakes and Barnesville, Minnesota, and Enderlin, North Dakota*, 17 FCC Rcd 25055 (MMB 2002); and Letter from Peter H. Doyle, Acting Chief, Audio Services Division, to Paul A. Cicelski, Esq. et al., File No. BAPH-20011101ABD (May 24, 2001).

¹² See *Chillicothe, Dublin, Hillsboro, and Marion, Ohio*, 20 FCC Rcd 6305, ¶ 16 (MB 2005).

¹³ See ICRC Petition at p. 1.

renewal application, it should have raised the issue two and a half years ago when the renewal application was released on public notice. Finally, ICRC claims that the Hope, Indiana allocation is short spaced to a construction permit for WRZX.¹⁴ However, ICRC does not specify which permit and does not provide a channel study to demonstrate this short spacing. Also, a review of CDBS reveals that when ICRC filed its Petition Station WRZX(FM) did not have a construction permit.¹⁵

6. ICRC's Petition attempts to revive a defective proposal that has been denied by the FCC on numerous occasions and it makes unsupported and false allegations against the Joint Parties and their proposals. As demonstrated herein, none of these arguments have any legal basis and seem to do nothing more than delay the outcome of this proceeding. Thus, the FCC must strike ICRC's Petition expeditiously so that the public can realize the benefits of the Joint Parties' proposal.

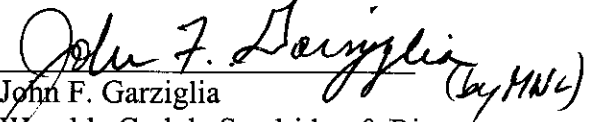
¹⁴ See ICRC Petition at p. 1.

¹⁵ Station WRZX(FM) subsequently filed a modification of license application on December 8, 2006 (BMLH-20061208ACR). However, this application was required to protect the new Hope allocation.

Respectfully Submitted,

NEWBERRY BROADCASTING, INC.
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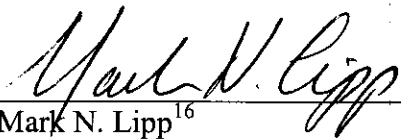
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December 29, 2006

¹⁶ Please note the change in address for Cumulus' counsel for the purpose of service.

CERTIFICATE OF SERVICE

I, Faye Jones, in the law firm of Wiley Rein & Fielding LLP, do hereby certify that I have on this 29th day of December, 2006, unless otherwise noted, caused to be mailed by first class mail, postage prepaid, copies of the foregoing "**Opposition**" to the following:

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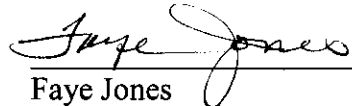
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